IN THE

# Supreme Court of the United States.

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COCKRILL, as Receiver of the First National Bank of Little Rock, Ark.,.....Plaintiff in Error,

v.

UNITED STATES NATIONAL BANK OF NEW YORK,.....Defendant in Error.

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## Brief for Plaintiff in Error on Motion to Dismiss.

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The United States National Bank obtained judgment against the receiver of the First National Bank of Little Rock, upon five notes of $5,000 each, alleged to have been endorsed by the Little Rock bank before its failure. The judgment established the claim and directed that it "be allowed by said receiver to be by him paid in accordance with the act of Congress in that behalf provided." There was no service upon or judgment against the bank.

The judgment was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. The receiver, under instructions from the Comptroller of the Currency of the United States which were filed in this court, has sued out a writ of error to reverse the judgment.

The motion to dismiss raises the question whether the jurisdiction of the trial court depended solely on diverse citizenship. If it did not, the judgment of the Circuit Court of Appeals is subject to review here.

Borgmeyer *v.* Idler, 159 U. S., 408.

Union Pacific Ry. *v.* Harris, 158 U. S., 326.

Although the plaintiff in the trial court may have proceeded on the ground of diverse citizenship, if "another fact upon which jurisdiction could be predicated existed," this court will assume jurisdiction.

U. P. Ry. *v.* Harris, 158 U. S., *sup.*

The amount involved exceeds the jurisdictional limit, and the sole defendant is a receiver of a national bank appointed by the comptroller of the currency under the authority of the national bank act. The question therefore is whether a suit against the statutory receiver of a national bank, arises under the law of the United States.

The national bank act authorizes the comptroller of the currency to appoint a receiver to wind up the affairs of an insolvent national bank. It is the duty of the comptroller to make the appointment on becoming satisfied that the bank has refused to pay its circulating notes or has become insolvent. It is made the duty of the receiver to "proceed to close up such association" (Revised Stats., sec. 5234, as amended in 1876). The following sections of the revised statute prescribe his functions and duties:

Section 5234. Such receiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of

record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary, to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Section 5235. The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspaper as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

Section 5236. From time to time, after full provision has been made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Under these provisions the receiver becomes an officer of the United States within the meaning of the third subdivision of section 629 of the Revised Statutes of the United States, and

as such can sue at law in the Federal courts without regard to citizenship or the amount involved.

Price *v.* Abbott, 17 Fed. R., 506, per Mr. Justice Gray.
Approved *in re* Chetwood, 165 U. S., 443.

Gibson *v.* Peters, 150 U. S., 342.

Black's Dillon on Removal, sec. 126 and cases cited.

If the receiver can sue in the Federal courts without regard to citizenship, he can be sued unless Congress has restricted the privilege, because as was ruled by this court through Chief Justice Marshall, in Osborn *v.* U. S. Bank, 9 Wheaton, 738, 825, the act of Congress authorizing him to sue "can only be sustained by the admission that his suit is a case arising under the law of the United States."

It follows that the numerous cases holding that a statutory receiver may sue in the Federal courts without regard to citizenship, all decide in effect that every such case arises under the law of the United States.

Thompson *v.* Pool, 70 Fed. R., 725.

"Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver."

McNulta *v.* Lochridge, 141 U. S., 327, 332.

Texas and Pacific Ry. *v.* Cox, 145 U. S., 593.

Actions against a statutory receiver of a national bank are therefore, actions to compel the comptroller of the currency, through the receiver who is only his agent, to pay out money which the act of Congress requires him to keep in the treasury of the United States to be by him disbursed ratably among the creditors of the bank. Every suit to establish a claim against the receiver involves the question whether the plaintiff is a creditor

of the bank within the meaning of the act of Congress and as such entitled to share in the distribution of the assets, which have been seized under authority of the act. Every such suit is an effort to control the official conduct of the receiver and to procure the application of funds in his official custody or in the treasury of the United States, to the satisfaction of a claim which the act of Congress requires the comptroller or the receiver to pass upon.

The receiver's "defense to every suit brought against him as receiver, is based upon the laws of the United States under which he holds his appointment, and in accordance with which he must discharge the trust devolved upon him."

Per Sanborn, C. J., in Hot Springs School District *v.* First National Bank, etc., 61 Fed. Rep., 417.

"His defense must rest upon a just interpretation of the laws of the United States, for as he holds his office under national authority, his conduct must be regulated by the national laws. From the premises and upon principles supported by the highest authority, the conclusion necessarily follows that the suit is one of which a circuit court of the United States is invested with jurisdiction by the clause of the act giving jurisdiction of suits of a civil nature 'arising under * * * the laws of the United States.'" Numerous authorities cited.

Grant *v.* Spokane National Bank, 47 Fed. Rep., 673.

The complaint in this case alleges that the plaintiff presented its claim to the receiver for allowance and that he refused to allow it. That is in effect a charge that the receiver has refused to perform a duty imposed upon him by the laws of the United States, towit, by section 5235 of the revised statutes.

Bartley *v.* Hayden, 74 Fed. Rep., 913.

Every suit against a corporation created by act of Congress, arises under the law of the United States.

Pacific Railroad Removal Cases, 115 U. S., 1.

For the same reason every suit against a receiver whose office is created by Federal authority arises under the same law.

Suits by or against receivers appointed by the circuit court of the United States in cases depending for jurisdiction on diverse citizenship only, arise "under the constitution and laws of the United States, in that the receivers were appointed by the circuit court, and derived their powers from and discharged their duties subject to those orders."

Rouse *v.* Hornsby, 161 U. S., 588.

St. Louis, Ark. & Texas Ry. *v.* Trigg, 63 Ark., 536.

Black's Dillon on Removal, sec. 125.

"Although a receiver of an insolvent national bank is appointed by the comptroller of the currency, pursuant to an act of Congress, rather than by a court, yet he clearly derives his official authority and rights from the laws of the United States. Consequently it is held that the Federal courts will have jurisdiction of an action brought by such a receiver to collect the assets of the bank, without regard to the citizenship of the parties, because the suit is one arising under the laws of the United States."

Black's Dillon Removal, sec. 126.

Commenting upon the rule that every suit against a corporation created by Congress, arises under the law of the United States, the chief justice in Texas and Pacific Railway *v.* Cox, 145 U. S., 593, said:

"The reasoning was that this must be so since the company derived its powers, functions and duties from those acts, and suits against it necessarily involve the exercise of those powers, functions and duties as an original ingredient."

A receiver appointed by the comptroller of the currency, derives his powers and functions from, and discharges his duties subject to, Federal authority, as much as does a receiver appointed by a Federal court, or a corporation created by a Federal statute.

As the receiver is an officer of the United States, a suit against him in his official capacity arises under the laws of the United States.

Bock *v.* Perkins, 139 U. S., 628.

*In re* Neagle, 135 U. S., 1.

Feibleman *v.* Packard, 109 U. S., 421.

Tennessee *v.* Davis, 100 U. S., 257.

The jurisdiction of the court in a suit against a receiver or other officer does not depend on the defense the officer will set up.

Cases *supra.*

Texas and Pacific Railway *v.* Cox, 145 U. S., 593.

Osborn *v.* U. S. Bank, 9 Wheat., 738, 824.

These cases appear to be decisive of the motion.

It has been argued that the receiver of a national bank stands in the shoes of the bank; and that as a national bank cannot sue or be sued, without regard to citizenship, the receiver cannot. But jurisdiction as to the receiver is not necessarily dependent upon jurisdiction as to the bank. While the constitutional power of Congress to grant jurisdiction over the receiver comes through the power to create the bank, it is within

the discretion of Congress to declare in what cases the Federal courts shall have jurisdiction over the one or the other, or over both or neither.

The national bank act authorized a national bank to be sued in the Federal courts in the district where the bank was situated without regard to citizenship. There was no express provision authorizing the receiver to sue or to be sued, but the nature of his duties, together with section 59 of the act, clearly implied that he was authorized to sue and be sued in the Federal courts. Section 59 directs "That all suits and proceedings arising out of the provisions of this act in which the United States, or its officers, or its agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the treasury."

In Kennedy *v.* Gibson, 8 Wallace, 498, after quoting the preceding section, the court said: "Considering this section, in connection with the succeeding section (the section authorizing the bank to sue and be sued), the implication is clear that receivers also may sue in the courts of the United States by virtue of the act without reference to the locality of their personal citizenship."

The receiver's right to sue was predicated upon his functions as an officer of the United States and not because he stood in the shoes of the bank.

Thus the law remained until 1882, when it was enacted by the fourth section of the act of July 12, that a national bank could not sue or be sued in the Federal courts without regard to citizenship. The status of the jurisdiction as to the receiver was not mentioned in the latter act. The first case in which the

jurisdiction as to the receiver of a national bank was decided after the act of 1882, was before Mr. Justice Gray on the circuit, in Price *v.* Abbott, 17 Fed. Rep., *sup.* He decided that suits by or against a statutory receiver of a national bank, are not suits brought by or against a national bank, but by or against an officer of the United States, and that the act of 1882 did not impair the Federal courts' jurisdiction over such receivers. That settled the law upon that subject, and the circuit courts, without exception, continued to sustain the jurisdiction of suits at law and in equity by and against statutory receivers of national banks.

The next change in the law was by the fourth section of the act of March 3, 1887, where it was provided that for the purpose of jurisdiction, national banks should be regarded as citizens of the States in which they were situated. It contained, however, the following provision: "The provisions of this section shall not be held to apply to the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or *cases for winding up the affairs of any such bank.*"

24 Statutes at large, 554.

In Armstrong *v.* Trautman, 36 Fed. Rep., 275, Judge Jackson ruled that prior to the act of 1887, it was settled that the Federal courts had jurisdiction of suits by receivers, and that the provision above quoted expressly preserved that jurisdiction. This decision was followed in numerous cases by the circuit courts.

Black's Dillon on Removal, sec. 126 and note.

Linn County National Bank *v.* Crawford, 69 Fed. Rep., 532.

After this legislation, came the decision of this court in Gibson *v.* Peters, 150 U. S., *sup.*, affirming in effect the correctness of the decisions on the circuit before referred to. It was an action by a United States district attorney against the statutory receiver of a national bank, to recover for legal services alleged to have been rendered the receiver. The plaintiff, the defendant and the bank, were all citizens of Virginia. This court entertained jurisdiction of the cause without question, and adjudged that a suit brought by the receiver against a debtor of the bank "was one arising out of the provisions of the act of Congress governing such (banking) associations." The case determines therefore in effect, that every suit by or against a statutory receiver of a national bank arises under the laws of the United States. It is the decision of this court on the very question presented by the motion to dismiss.

II.

The complaint by fair intendment alleges that the receiver was appointed by the Comptroller of the Currency of the United States.

It alleges that the First National Bank of Little Rock, was a corporation created under the laws of the United States; that it became insolvent; that the defendant was appointed receiver of said bank; that the plaintiff had presented its claim to the receiver for allowance, and that he had rejected it.

Whenever a national bank becomes insolvent, it is the comptroller's duty forthwith to appoint a receiver. The law presumes that every official does his duty. It is alleged that a

national bank became insolvent and that a receiver was appointed. It will be presumed that the appointment was by the comptroller.

It is alleged that the plaintiff presented his claim to the receiver for allowance. Section 5235 U. S. Rev. Statutes and the practice established in the comptroller's office, require claims to be presented to the receiver for allowance before suit. "Creditors must seek their remedy through the comptroller in the mode prescribed by the act of Congress."

Bank *v.* Pahquioque Bank, 14 Wal., 383, 401.

No other receiver is known to the law to whom a creditor is required to present his claim for allowance before he is authorized to sue on it. Hence it will not be presumed in favor of the pleader, that the receiver described in the complaint was not appointed in accordance with the procedure which the pleader alleges the plaintiff conformed to—that is the act of Congress.

For the purpose of jurisdiction in this court, it is only necessary that jurisdiction of the circuit court did not depend entirely upon diverse citizenship when the suit was commenced—that is, it is to that point of time simply that the enquiry is referred.

Borgmeyer *v.* Idler, 159 U. S., 408, 414.

A different question from diverse citizenship always inheres in this class of cases "as an original ingredient" (Texas & Pacific Railway *v.* Cox, 145 U. S., 593), and the plaintiff will not be permitted to defeat the defendant's right of removal or appeal by neglect, whether unintentional or willful, to allege the source of the receiver's appointment. This case is analogous to that of the Texas and Pacific Railway *v.* Barrett, 166 U. S., 617, where the plaintiff, suing a Federal corporation, alleged simply that it was "a railway corporation, duly incorporated." The

court looked further into the record and ascertained that it was incorporated by Congress, and so held the defendant's petition for removal good.

In Texas and Pacific Ry. *v.* Cody, 166 U. S., 606, the plaintiff, a citizen of Texas, sued the Texas and Pacific Railway, in a State court, and in order to prevent a removal, alleged that the defendant was a "corporation created and existing under the laws of Texas." As State railway corporations are created under general laws, the court could not know judicially that the allegation of the complaint as to the source of the defendant's incorporation, was false. But the court ascertained from other parts of the record that that particular railway was incorporated by Congress, and the subterfuge resorted to by the plaintiff went for naught.

If anything is required to make plain the meaning of the allegations of the complaint in this case in regard to the appointment of the receiver, the court need look only to the plaintiff's judgment of recovery, quoted in the early part of this brief, to ascertain that the receiver holds his office in pursuance of the statutes of the United States. The last order in the cause is as follows:

"It appearing that said Cockrill (the defendant) is receiver by virtue of appointment of the comptroller of the currency in accordance with the act of Congress, it is ordered that he prosecute his writ of error without bond."

A similar order was entered here when the writ of error was allowed, in accordance with Pacific National Bank *v.* Mixter, 114 U. S., 463.

But if the receiver had been appointed by a Federal court to wind up its affairs as an insolvent corporation, the jurisdic-

tion in that case would arise under the laws of the United States (California Bank *v.* Kennedy, 167 U. S., 362), and the suit against the receiver in this case would arise under the same law.

Rouse *v.* Hornsby, 161 U. S., *sup.*

If appointed by a State court, the complaint in this case stated no cause of action within the jurisdiction of the Federal court, for "no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court appointing him."

Porter *v.* Sabin, 149 U. S., 473, 479.

It was not alleged that permission to sue the receiver had been granted by any court. This court will not presume that the plaintiff was proceeding in contempt of court.

No court could maintain jurisdiction of the assets of the bank after the appointment of a receiver by the comptroller.

National Bank *v.* Colby, 21 Wal., 609.

It is respectfully submitted that the motion should be denied.

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